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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 708

JOSEPH CIPRIANO,

Appellant,

CITY OF HOUMA, C. LESLIE BROUSSARD, Mayor, SEBASTIAN L. DAVID, CHARLES DAVIDSON, PETER BOURGEOIS, JR., SAMUEL LUSCO and WILBERT P. BONVILLAIN,

Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana

BRIEF FOR DEFENDANTS — APPELLEES

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 705

JOSEPH Q. CIPRIANO,

Appellant,

versus

CITY OF HOUMA, G. LESLIE BROUSSARD, Mayor, CHRISTIAN L. OLIVIER, CHARLES DAVIDSON, PETER BOURGEOIS, JR., SAMUEL LUSCO and WILBERT P. BONVILLAIN,

Appellees.

On Appeal from the United States District Court for the Eastern Division of Louisiana.

BRIEF FOR DEFENDANTS — APPELLEES

STATEMENT

On September 12, 1967, the Mayor and Board of Aldermen of the City of Houma, defendants herein, adopted a resolution ordering and calling a special election to be held in said City under the authority conferred by Part II, Chapter 4, Title 39 and Sub-Part C, Part I, Chapter 10, Title 33 of the Louisiana Revised Statutes, and other constitutional and statutory authority supplemental thereto, including Article XIV,

Section 14(m) of the Louisiana Constitution for the year 1921 as amended. At said election, there was submitted to the registered property taxpayer voters a proposition authorizing the issuance of $10,000,000.00 of utility revenue bonds for the purpose of constructing, acquiring, extending or improving the combined electric light and power plant system, water supply purification and distribution plant system and natural gas system of said City.

On October 24, 1967, the election was held in the City of Houma and at said election 1,828 voters representing an assessed valuation of $2,736,258.00 voted in favor of the proposition submitted and 896 voters representing an assessed valuation of $1,108,268.00 voted against the proposition. Accordingly, the said proposition was carried by a majority of 932 votes in number, representing an assessed valuation of $1,627,990.-00. The election was duly promulgated by the City's governing authority on October 25, 1967. Some 55 days after the date of said election, plaintiff, a registered voter of the City who does not own real property, filed his action seeking relief as set forth in his complaint. Plaintiff contends that he is a member of a class of 6,926 registered non-property taxpaying voters in the City of Houma and that he and all members in his class were not entitled to vote at said election because of the provisions of Louisiana law requiring that a voter be a qualified resident property taxpayer of the City. Plaintiff further contends that he and the members of his class were deprived of certain civil rights granted by the United States Constitution in not being eligible to vote at said election and that the statutes authorizing the election are in violation of the

equal protection and due process clauses of the United States Constitution.

Although the record reveals that the total number of registered voters in the City of Houma on October 24, 1967 was 11,606 and the total number of property taxpaying voters on said date in the City was 4,680, the statement that the total number of non-property taxpaying registered voters amounted to 6,926 is somewhat misleading. Louisiana is a community property state and allows the husband and wife to vote separately and split the property assessment of their real property at a bond election, such as in the instant case. Consequently, the 4,680 property taxpaying voters reflected in the record are actually those registered voters whose names appear on the assessment rolls of the City as property owners and does not include the spouses of such assessed property owners who are registered voters eligible to vote and split the assessment with the assessed property owners.

The matter was tried before a three-judge court and the majority of the trial court found for the defendants, holding that the statutes pursuant to which the defendants called the election as aforesaid were not in violation of the Fourteenth Amendment of the United States Constitution. Plaintiff-Appellant has appealed from the trial court directly to this Court.

ARGUMENT

I

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITU-

TION OF THE UNITED STATES DOES NOT COMPEL A STATE LEGISLATURE TO GRANT ALL REGISTERED VOTERS OF A COMMUNITY THE RIGHT TO PARTICIPATE IN A LOCAL ADMINISTRATIVE ELECTION APPROVING THE ISSUANCE OF UTILITY REVENUE BONDS. *HARPER V. VIRGINIA STATE BOARD OF ELECTIONS* IS NOT CONTROLLING IN THIS INSTANCE. THE SPECIAL INTEREST OF THE PROPERTY TAXPAYER CONSTITUTES A RATIONAL BASIS FOR CLASSIFICATION.

While plaintiff contends he was denied due process of law and equal protection under the Fourteenth Amendment of the Constitution, he does not seriously raise the issue of due process or cite authorities which support such denial. His real complaint is the denial of equal protection of the law and plantiff relies solely upon *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) to support his position. The *Harper* case only prevents states from fixing voter qualifications which "invidiously" discriminate. It does not declare that the Fourteenth Amendment abrogates the power of the states to classify voters. In deciding the *Harper* case, this Court was concerned solely with those requirements for voting which relate to "one's ability to participate intelligently in the electoral process" and in reaching its decision, the Court cited authorities which involved the election of officials for general governmental purposes. The Court concluded that a state violates the equal protection clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee the electoral standard. However, there appears to be a distinct voting requirement rationale which focuses on the "interests" of the voter rather than upon

his competence of affluence. Residence requirements are one example of the application of that rationale, and taxpayer requirements are another. That "affluence" is not a constitutionally unpermissible principle of classification is evidenced by such acceptable concepts as a taxpayer's suit. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevence to the purpose for which the classification is made and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. *Walters v. City of St. Louis*, 347 U.S. 231, 237, 74 S.Ct. 505, 98 L.Ed. 660 (1954).

There is a vast distinction to be made in a case such as this, involving, as it does, a local administrative election, and the exercise of the voting franchise for selection of legislative officers responsible, in the final analysis, for the course of government. The present statutory election is merely a restriction imposed by the Louisiana Legislature as a matter of public policy; there is no inherent federal or state constitutional requirement that any election be held. The provisions of the Louisiana constitution and statutes pursuant to which the defendant (City of Houma) is authorized to issue utility revenue bonds vests complete control and discretion in the governing authority (the elected officials) to initiate and ultimately authorize the issuance of such bonds, and also requires approval from a separate state board (Louisiana State Bond and Tax Board). The submission of the proposition to the electorate is only one of several steps to be taken in the issuance of such bonds and the consent of the electorate is purely a veto power. Furthermore,

even if all of the approvals as provided by the statutes and constitution are obtained, including the electorate, the bonds cannot be issued and sold without the elected officials of the City actually authorizing the ultimate issuance and sale thereof by separate and affirmative official action. Under the circumstances, if property owners in the instance before this Court have a special interest in the subject matter to which the statute is directed, considered in light of the kind and purpose of the election required by the statute to be held, such special interest constitutes a rational basis for classification. There is no "invidious" discrimination here, absent which the statute must be held constitutional. This is a local administrative election, the essence of which is to perform an advisory function dealing not with the legislative or governmental character of the political subdivision, but with the purely private and business, or proprietary, functions of the political subdivision.

The undertaking of the ownership of a public utility, even though the bonds issued for the acquisition of the facility are payable only from revenues, commits the public corporation to the management and operation of the public enterprise, and a quasi-corporate function. We submit that the property owners whose property and property values will be affected by the efficiency and adequacy of the utility serving their property do have an additional and special pecuniary interest in this decision. While it is true that all users of the system pay for the service, the initial decision to publicly own and operate the utility, or to improve it after acquisition, are matters of special and

peculiar interest to the property owners (whether as occupants, landlords or owners of unimproved property), because the value and even the basic security of their investment in the property are at stake, dependent as they are on proper, reasonable, and well managed utility service. The non-property owner shares none of this particular concern nor bears any of this particular risk, and if the wrong decision is made or service is poor, his control, like that of the property owner, is through the ballot box at the election for municipal officials.

Plaintiff fails to give recognition to the fact that the rates and charges which must be paid by the citizens of the City are fixed solely in the discretion of the elected officials of the City. Whether the citizen be a property owner or not, if he is a registered voter he has the right to elect the public officials who fix the utility charges for the operation of the utilities system and who have full discretion and control over the issuance and sale of revenue bonds. The voter's representative therefore initiates and finally approves the issuance of the bonds, and fixes the rates and charges to service such debt; the voter cannot be expected to vote twice on such an administrative function.

The relief which plaintiff is asking this Court to grant is inappropriate to the right contended for. Plaintiff is not seeking a declaration of his right to vote at some specific election in the future, but to enjoin the issuance of bonds voted at an election in which he did not even attempt to participate. If injunctive relief was the real purpose of plaintiff's suit, he should have instituted such action prior to the date on which

the election was held. In his own testimony he admitted that he did not consider this procedure since he felt the election would be defeated, and then waited 55 days after the date of the election to file this action.

II

IF THE ELECTION STATUTES OF THE STATE OF LOUISIANA RELATIVE TO UTILITY REVENUE BOND ISSUES ARE HELD TO BE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION, THE EFFECT OF THE DECISION OF THIS COURT MUST BE PROSPECTIVE ONLY AND NOT RETROSPECTIVE.

Should this Court determine that the election statutes pursuant to which the City of Houma held the revenue bond election at issue are in violation of the equal protection clause of the United States Constitution, the Court must give very serious consideration to the prospective or retrospective effect of such a decision. Plaintiff in his brief argues that it is only necessary that the Court give prospective effect to any decision declaring said statutes unconstitutional. Nevertheless, plaintiff further contends that since he instituted this action within the 60-day prescriptive period or statute of limitations provided in the Louisiana statutes, he should be granted the relief petitioned for. If the Court should adopt plaintiff's position, all elections held subsequent to October 24, 1967 and bonds issued thereunder would be valid and legally issued where no challenge to said election was filed within the 60-day prescriptive period, but the election held in the City of Houma on October 24, 1967 would be invalid. It is obvious that plaintiff's pos-

ition is inconsistent in that this Court could not declare the Louisiana statutes unconstitutional prospectively but void the election held by defendant on October 24, 1967, without impairing those elections held pursuant to this same statutory authority subsequent to October 24, 1967 and the bonds issued as a result thereof. A state statute of limitations cannot deprive or deny a federal court from voiding a state law which is repugnant to the United States Constitution. Plaintiff's argument that authority or the right of defendant to issue bonds is only vested after the running of the 60-day prescriptive period from the date of promulgation of the election returns is wholly unsupported by the Louisiana statutes upon which he relies.

Since October 24, 1967, numerous municipalities in Louisiana and other political subdivisions in this State and elsewhere have issued and sold bonds at elections held subsequent to and prior to said date. The only logical prospective effect of the decision of this Court is to have the decision take effect prospectively from the date of the rendition of the decision. Other states' statutes which authorize revenue bonds pursuant to a taxpayers' election do not have a 60-day prescriptive period or similar statute of limitations as provided in the Louisiana statutes, and this decision, which will have a nationwide effect on all revenue bond issues authorized pursuant to a taxpayer's election, would necessarily void and invalidate all such bond issues and elections if the position advocated by plaintiff is adopted. Precedent for the prospective effect of an adverse decision of this Court as to the future only is set forth in the legislative reapportionment decisions of this Court as well as in the

recent case of *Allen v. State Board of Elections,* Nos. 3, 25, 26 and 36 - October Term, 1968; 89 S.Ct. 817 (1969). Either the election and the issuance of bonds authorized thereunder must be held unconstitutional from a given date, i.e., the date of the decision of this Court or the date of the election held in the City of Houma, or the Court must give total retroactive effect to its decision. To give total retroactive effect to such a decision would cause a financial calamity for municipal debt securities in the United States. To give prospective effect to such a decision from October 24, 1967 would likewise cause serious and irreparable damage to political subdivisions of these United States and to bondholders who have purchased revenue bonds subsequent to October 24, 1967 authorized at elections held under statutes requiring a taxpayer's election.

The defendant, City of Houma, and many other municipalities in the State of Louisiana have for many years issued revenue bonds under the authority of the statutes challenged by plaintiff. If these statutory provisions are held to be in violation of the United States Constitution, the retrospective effect of such a decision would have the effect of invalidating all revenue bonds heretofore issued by all municipalities in the State, as well as other states and political subdivisions throughout the United States which have issued bonds under similar voting requirement statutes. Consider the effect of such a retrospective ruling on the bondholders and the impairment of their contracts with issuing authorities. In only a very limited area of Louisiana, there are outstanding at this time revenue bonds payable from the revenues derived from the ope-

ration of municipal utilities systems (not including bonds previously refunded) of the Cities of Alexandria, Franklin, Houma, Lafayette, Monroe, Morgan City and Thibodeaux amounting to approximately $120,000,000.00. (Source: Louisiana Municipal Bond Service, Inc., New Orleans, La.). Although it is difficult to accurately estimate the amount of securities issued by political subdivisions of other states under similar taxpayers elections, we venture to guess that it is in the billions of dollars.

The authority cited by plaintiff for prospective relief is the leading case of *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). We also believe that it is controlling in the instant case. Vested rights have become final insofar as outstanding bonds issued by the City of Houma and other municipalities are concerned and, likewise, approval has been evidenced by the voters of the City of Houma on October 24, 1967 insofar as the $10 million bond issue is concerned. Plaintiff, desiring to enjoin the election, should have instituted his action for injunctive relief prior to the date of the election. Instead, his challenge was not filed until a considerable period of time elapsed thereafter. Actually, the relief prayed for by plaintiff has now become moot as is set forth in the next section of this brief.

III.

THE INJUNCTION RELIEF PRAYED FOR BY PLAINTIFF-APPELLANT HAS NOW BECOME MOOT.

The Governor of the State of Louisiana, having knowledge of this suit and the potential effect an adverse decision might have upon the credits of the State

of Louisiana and its political subdivisions, included in his call for the Extra Session of the Louisiana Legislature held in the latter part of 1968 the enactment of legislation which would permit the City of Houma and other political subdivisions of the State to issue utility revenue bonds without any further election. Act No. 33 of the Extra Session of the Louisiana Legislature for the year 1968, amending Section 4258 of Title 33 of the Louisiana Revised Statutes of 1950 (included in the appendix of this brief), became effective on January 6, 1969 and validated all utility revenue bonds voted at elections held prior to the enactment of said act. This legislation has specifically validated and authorized the issuance of $10 million of utility revenue bonds approved by the electorate of the City of Houma on October 24, 1967 without any further election approval. The pertinent provision of this act is as follows:

> "In the event a property taxpayers' election has heretofore been held and promulgated approving the issuance of bonds under this Subpart, as contemplated in subparagraph (a) above, the governing body may proceed with the issuance and sale of such bonds without complying with the provisions of this section and without any further election approval."

It is clear from the foregoing that the Louisiana Legislature intended to validate all bonds previously voted under Sub-Part C of Chapter 10, Title 33 of the Louisiana Revised Statutes of 1950, without any further election approval, where the results of the election have been duly promulgated, whether the election was valid or invalid. The authority for the Louisiana Legislature

to require or not require an election is discretionary under the provisions of Article XIV, Section 14(m) of the Louisiana Constitution for the year 1921, as amended.

Notwithstanding an adverse decision of this Court which would have the effect of declaring the election statutes of the State of Louisiana relative to utility revenue bonds repugnant to the equal protection clause of the United States Constitution, and whether such decision should have retrospective or prospective effect, this Court cannot now grant plaintiff the relief prayed for since the Louisiana Legislature has validated the bonds approved on October 24, 1967 without any further election approval. Accordingly, injunctive relief prayed for by plaintiff in this case has now become moot.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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April 7, 1969

CERTIFICATE

I hereby certify that a copy of the foregoing Brief for Defendants-Appellees has been served upon opposing counsel of record by depositing a copy thereof in the United States Mail, postage pre-paid, addressed to his address of record.

New Orleans, Louisiana

April 7, 1969

E. E. HUPPENBAUER, JR.

APPENDIX

ACT 33 OF THE EXTRA SESSION OF THE LOUISIANA LEGISLATURE FOR THE YEAR 1968.

AN ACT

To amend and reenact Section 4258 of Title 33 of the Louisiana Revised Statutes of 1950 relative to the voting and issuance of revenue bonds by municipal corporations under the provisions of Subpart C, Part I, Chapter 10, Title 33 of the Louisiana Revised Statutes of 1950 and providing for the validation of bonds heretofore voted or issued thereunder and proceedings had in connection therewith.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 4258 of Title 33 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§4258. Election to authorize the issuance of bonds; validation

Before the resolution authorizing the issuance of bonds under this Subpart is adopted by the governing body, the question of the issuance of the bonds shall be submitted and approved at either a special or general election which shall be ordered, conducted and canvassed in accordance with either of the following election procedures, at the discretion of the governing body:

(a). The question of the issuance of the bonds may be submitted to and approved by votes of a ma-

jority in number and amount of the property taxpayers who vote at an election held hereunder. In the event the governing body elects to order a property taxpayers' election, all matters pertaining thereto, including the qualifications of voters and the manner of calling and conducting the election and canvassing and promulgating the results thereof shall be governed by the provisions of Chapter 4, Subtitle 2, Title 39.

(b). The question of the issuance of the bonds may be submitted to and approved by a majority of the qualified electors of the municipal corporation who vote at an election held therein substantially in accordance with the general election laws of the State of Louisiana, except that the election shall be ordered, conducted, canvassed and notice thereof published by the governing body in accordance with the procedures set forth in Chapter 4, Subtitle 2, Title 39, except where inconsistent with the provisions of this section. In the event the governing body elects to order such an election, all qualified resident electors shall be entitled to vote in the election and voters shall not be required to sign a ballot. Voting machines shall be used in the holding of this type of election and assessed valuation shall not be voted in the election.

In the event a property taxpayers' election has heretofore been held and promulgated approving the issuance of bonds under this Subpart, as contemplated in subparagraph (a) above, the governing body may proceed with the issuance and sale of such bonds without complying with the provisions of this section and without any further election approval.

All bonds heretofore issued under the provisions of this Subpart are hereby validated, ratified and confirmed and declared to be valid and binding obligations of the municipal corporation in accordance with the terms of their issuance in spite of any one or more irregularities which may have occurred in the passage of this Subpart or question which might be raised as to the constitutionality of any procedural provision of this Subpart. All proceedings heretofore had in connection with the issuance of such bonds are hereby ratified, validated and confirmed.

Section 2. If any provision or item of this Act or the application thereof is held to be invalid, such invalidity shall not affect any other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.